

APPEAL NO. 060524
FILED MAY 12, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 15, 2006. The hearing officer determined that the respondent (claimant) was entitled to the second quarter of supplemental income benefits (SIBs).

The appellant (carrier) appeals, contending that the medical evidence fails to support the hearing officer's decision. The claimant responds, urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable (right knee and right hand/wrist) injury on ____, that the claimant has an impairment rating of 15% or greater, that the claimant did not elect to commute her impairment income benefits and that the qualifying period for the second quarter was from August 14 through November 12, 2005. Based on the claimant's testimony the hearing officer commented that the claimant underwent two surgeries to the knee and three surgeries to the wrist/hand. Unappealed is a determination that the claimant was not enrolled in and satisfactorily participating in a full-time rehabilitation program, sponsored by the Department of Assistive and Rehabilitative Services (DARs). Eligibility criteria for SIBs entitlement are set forth in Section 408.142.

Section 408.142 as amended by the 79th Legislature, effective September 1, 2005, references the requirements of Section 408.1415 regarding work search compliance standards. Section 408.1415(a) states that the (Texas Department of Insurance, Division of Workers' Compensation (Division)) commissioner by rule shall adopt compliance standards for SIBs recipients. In that no such rules have been implemented as of this date, we refer to the eligibility criteria for SIBs entitlement in 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Commissioner's Bulletin No. B-0058-05 dated September 23, 2005, provides that until new SIBs rules are adopted, the Division's Rules 130.100-130.110 govern the eligibility and payment of SIBs and remain in effect until they are amended, repealed, or modified by the Commissioner of Workers' Compensation. Also, Rule 130.100(a) provides that entitlement or non-entitlement to SIBs shall be determined in accordance with the rules in effect on the date a qualifying period begins, which in this case was August 14, 2005.

The claimant proceeded, and the hearing officer found entitlement, on the basis that she had a total inability to work in any capacity. The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with her ability to work during the qualifying period. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate

with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The hearing officer relies on the report of (Dr. J), an RME doctor, for the narrative report from a doctor which specifically explains how the injury causes a total inability to work. The claimant was referred to Dr. J on October 5, 2005. Dr. J ordered a functional capacity evaluation (FCE) the same date. The FCE of October 5, 2005, performed by (Dr. E) concluded that the claimant had given consistent effort and that she "is currently at a PDC of LIGHT, which does meet herself reported PDC of LIGHT as a Floor Supervisor for [the employer]." Dr. J, also in a report dated October 5, 2005, evaluated claimant's right knee, referenced the right wrist surgeries, his examination and the FCE, and concluded that: "It is my opinion that this claimant should be able to return to light duty as described in the Dictionary of Occupational Titles, of the U.S. Dept. of Labor." Dr. J prescribes certain restrictions and in the following paragraph states: "This opinion is contingent on her being weaned of any medication that has a high potential of affecting her state of alertness." Dr. J also references an attached "[Work Status Report] DWC-73 form" which releases the claimant to work with restrictions identified in the narrative report. Dr. J in his October 5, 2005, report, and a follow up report dated October 31, 2005, notes that the records indicate that the claimant was prescribed "ibuprofen (no dose or frequency was stated)." The claimant also testified that she is currently taking vicodin and ibuprofen. As Dr. J indicates there is no evidence on the dosage or frequency of the medication and no evidence whether either or a combination of the medication "has a high potential for affecting her state of alertness."

Other records in evidence include DARs reports dated November 15, 2005, and date stamped December 5, 2005, which indicate that the claimant's hand doctor has no restrictions and that (Dr. R), claimant's knee doctor has certain lifting, walking, standing restrictions. Dr. R in separate reports dated August 29 and October 3, 2005, notes a 25 pound lifting restriction with no walking, standing or sitting for more than 10 minutes.

We hold that Dr. J's report dated October 5, 2005, releasing the claimant to light duty subject to weaning off any medication that has a high potential for affecting her state of alertness (with no evidence of the dosage and frequency or effect any medication claimant may be taking) does not constitute a narrative report from a doctor which specifically explains how the injury causes a total inability to work. We further note that there are records which show that the claimant is at least able to return to light duty. We hold that the claimant has failed to meet the requirements of Rule 130.102(d)(4).

Accordingly we reverse the hearing officer's decision that the claimant is entitled to the second quarter of SIBs as not being supported by the evidence and render a new decision that the claimant is not entitled to the second quarter of SIBs.

The true corporate name of the insurance carrier is **AMERICAN PROTECTION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, STE 750
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge